

**Letter of Findings Number: 10-0192P  
Withholding Tax and Food and Beverage Tax-Penalty  
For the Periods 2007-2009**

**NOTICE:** Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUE**

**I. Tax Administration–Penalty.**

**Authority:** IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; IC § 6-8.1-10-6; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the penalty for late filing of various tax returns.

**STATEMENT OF FACTS**

Taxpayer is a corporation doing business in Indiana. Taxpayer submitted various employee withholding tax payment and information returns after the appropriate statutory deadlines. As a result, the Indiana Department of Revenue ("Department") imposed penalties against Taxpayer. Taxpayer protested the imposition of the penalty.

With the protest for Taxpayer, another protest was submitted on behalf of a second corporation. The second corporation paid its April 2009 county food and beverage tax; however, the second corporation wrote a check for \$505.94 rather than the correct tax of \$595.95. The Department imposed a penalty based on the \$90 underpayment, which was protested as well.

**I. Tax Administration–Penalty.**

**DISCUSSION**

**A. Late withholding tax payments**

Taxpayer first protests the penalty imposed under IC § 6-8.1-10-2.1(a) and (b) for late payment of employee withholding taxes. IC § 6-8.1-10-2.1(d) provides that a penalty may be waived for "reasonable cause," while [45 IAC 15-11-2](#) provides that, in order to grant penalty waiver, "the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section."

Taxpayer has merely asserted—without additional evidence—that the returns in question were mailed prior to the statutory deadline. While Taxpayer may not have acted with an intent to defraud, Taxpayer has not demonstrated "ordinary business care" sufficient to justify penalty waiver.

**B. Information returns**

Taxpayer also protests the imposition of the penalty on Taxpayer's failure to timely file forms W-2 and WH-3 on behalf of its employees. This penalty was imposed pursuant to IC § 6-8.1-10-6, which provides for a ten dollar (\$10) penalty for each information return submitted late. A form W-2 and a form WH-3 are informational returns within the scope of the statute.

Taxpayer contends that it mailed the W-2s and WH-3 for 2007. However, Taxpayer has not provided further evidence related to its contentions.

For proposed assessments such as the penalty imposed against Taxpayer, IC § 6-8.1-5-1(c) provides that the assessment is presumed to be correct, and the burden of showing that the assessment was improper is on the taxpayer. While the Department recognizes Taxpayer's arguments, Taxpayer has not provided sufficient information to establish that the penalty imposition was improper.

**C. Food and beverage tax for the second corporation**

A second corporation protests the penalty imposed under IC § 6-8.1-10-2.1(a) and (b) for late payment of county food and beverage tax for April 2009. The late payment resulted from a check written for an erroneous tax amount.

IC § 6-8.1-10-2.1(d) provides that a penalty may be waived for "reasonable cause," while [45 IAC 15-11-2](#) provides that, in order to grant penalty waiver, "the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section."

While the second corporation may not have acted with an intent to defraud, the second corporation has not demonstrated "ordinary business care" sufficient to justify penalty waiver.

**FINDING**

Taxpayer's protest is denied in full.

*Posted: 09/01/2010 by Legislative Services Agency*  
An [html](#) version of this document.